



California Fair Political Practices Commission

July 11, 1986

David B. Swoap
Franchetti & Swoap
One Market Plaza
Steuart Street Tower, Suite 1210
San Francisco, CA 94105

Re: Your Request for Advice
Our Advice No. A-86-199

Dear Mr. Swoap:

You have written asking for formal written advice relative to your circumstances as a former state employee with respect to the provisions of the Political Reform Act ("Act").^{1/}

QUESTION

You have asked whether, as a former state administrative official, you can consult for various county governments to assist them in implementing the "workfare" legislation which you were involved with during your tenure as Health and Welfare Secretary.

CONCLUSION

Your involvement within the administration in the legislative process does not prevent you from the consulting role you now wish to pursue.

ANALYSIS

Since you are no longer a public official, the basic conflict of interest provisions of the Act do not apply. Section 87100. However, as a former state administrative official, certain restrictions may apply to your future, compensated activities. Sections 87400-87405. Section 87400 provides as follows:

Unless the contrary is stated or clearly appears from the context, the definitions set forth in this section shall govern the interpretation of this article.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise noted.

(a) "State administrative agency" means every state office, department, division, bureau, board and commission, but does not include the Legislature, the courts or any agency in the judicial branch of government.

(b) "State administrative official" means every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.

(c) "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

(d) "Participated" means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.

You were a state administrative official when you were employed by the state as Secretary of Health and Welfare. Sections 87401 and 87402 place certain restrictions upon the activities of former state administrative officials, these sections provide as follows:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

David B. Swoap
July 11, 1986
Page 3

(b) The proceeding is one in which the former state administrative official participated.

Section 87401.

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

Section 87402.

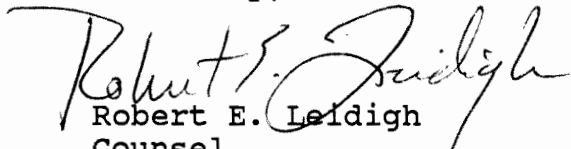
These restrictions only apply to "judicial, quasi-judicial or other proceedings" in which you "participated" while employed by the state. Section 87400(c)(d). The restrictions do not apply to legislative or quasi-legislative actions. Your role "in the development and provision of Administration support of the workfare legislation" does not fall into the category of "judicial, quasi-judicial or other proceeding" as defined in Section 87400(c), above. Consequently, your proposed role on behalf of various counties to provide assistance in implementing the program established by the legislation, including:

...technical advice on proper administrative design, perhaps seeking research and development funds that may be available, and liaison with the State Department of Social Services in the development, consideration, and approval of ... [the counties] GAIN implementation plan...

is permitted, because you have not participated in any of the types of proceedings to which the foregoing statutory prohibitions apply.

I trust this letter adequately responds to your question. Should you have questions regarding the letter, I may be reached at 916/322-5901.

Sincerely,


Robert E. Leidigh
Counsel
Legal Division

REL:km

Michael Franchetti
David B. Swoap

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June 15, 1986

Mr. John Keplinger
Executive Director
Fair Political Practices Commission
428 J Street, Suite 800
Post Office Box 807
Sacramento, CA 95814

Dear John:

I should like you and your staff to guide me, via the provision of an advisory opinion if that is possible, concerning a question that has emerged regarding my involvement as Health & Welfare Secretary in the development and provision of Administration support of the workfare legislation last year (Greater Avenues for Independence).

As you know, we represent Los Angeles County (which was a pre-existing client of Franchetti & Franchetti before Franchetti & Swoap was formed on November 1, 1985; Franchetti & Franchetti remains a law firm, but the governmental relations contract for the County of Los Angeles was transferred to the new firm, F&S). They, along with the other 57 counties in the State, are now faced with the task of implementing GAIN, and have expressed a possible interest in either amending or including in our current contract consultation work that we would do for them in implementing GAIN in Los Angeles County. Presumably this would include technical advice on proper administrative design, perhaps seeking research and development funds that may be available, and liaison with the State Department of Social Services in the development, consideration, and approval of their GAIN implementation plan.

I should like to know and to be certain if such involvement would be acceptable on behalf of this firm with Los Angeles (or in fact, any other county as well).

Thank you for your assistance and counsel in this regard.

Sincerely yours,

FRANCHETTI & SWOAP

by:



David B. Swoap

DBS:s

Franchetti & Swoap

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California Fair Political Practices Commission

June 18, 1986

David B. Swoap
Franchetti & Swoap
One Market Plaza
Steuart Street Tower, Suite 1200
San Francisco, CA 94105

Re: 86-199

Dear Mr. Swoap:

Your letter requesting advice under the Political Reform Act has been received on June 17, 1986 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

A handwritten signature in cursive script, reading "Robert E. Leidigh", is written over the typed name.

Robert E. Leidigh
Counsel
Legal Division

REL:plh

Unhealthy political alliances

The Sacramento Bee

State Health Services Director Ken Kizer insists that his controversial decision favoring a client of his former boss and mentor, David Swoap, had nothing to do with Swoap's lobbying efforts on the client's behalf, but who'll ever believe that?

SWOAP, FORMER secretary of the state Health and Welfare Agency, was instrumental in getting Kizer his present job. Since last November, when Swoap resigned, he has worked as a lobbyist for, among others, the Eli Lilly Co., manufacturer of a drug called Ceclor, which is used in the treatment of certain influenza cases. Despite recommendations from his own staff and from a panel of the California Medical Association that Ceclor is too expensive to justify inclusion on the regular Medi-Cal

formulary -- the list of drugs that can be prescribed under Medi-Cal without special approval -- Kizer put the drug on the list, a decision likely to be worth a great deal to the manufacturer.

Kizer's assertion that Swoap's lobbying had no influence on the decision may indeed be true. The drug is effective and its addition to the formulary, although opposed by Kizer's staff, had been cleared by a departmental advisory committee. Kizer points out that there is a serious problem with influenza cases among the elderly that resist treatment with other influenza medications in the formulary.

BUT GIVEN Swoap's active intervention, which Kizer acknowledges, how can anyone be confident the decision was made on the merits? As Bee columnist Dan Walters reports, certainly there's no such confidence in Kizer's own agency, where it's being described as the payment of a political debt, and there can be no

such confidence anywhere else. There's at least some reason to believe, as Walters reported, that Kizer was influenced by Swoap in another drug case and considerable reason to think there was influence on this one. Certainly there's no doubt that six months after he left as its head, Swoap has been very much in evidence in the corridors of his old agency.

It's not certain whether any law at present prohibits this kind of revolving-door influence peddling; nor is it likely that a perfect statute can be written. Even a senior official shouldn't be barred forever from lobbying his old agency. But clearly some prohibitions are in order. Anyone with a sense of ethics, in government or outside, would understand that, even when there is no law. If Swoap is really Kizer's friend, the nicest thing he could do for him would be to stay out of the corridors of his old department.